

RAFAEL GAMBOA AND LINDA GAMBOA,)	3:10-CV-454-ECR-VPC
)	
Plaintiffs,)	
)	
vs.)	<u>Order</u>
)	
WORLD SAVINGS BANK, FSB, WACHOVIA)	
MORTGAGE FSB, WELLS FARGO BANK,)	
N.A. , and DOES 1-10)	
)	
Defendants.)	
)	
)	

Now pending is Defendants' motion to dismiss (#4). The motion is ripe, and we now rule on it.

On August 26, 2006, Plaintiffs executed a promissory note and deed of trust. (Compl. ¶ IV (#1-2).) On August 28, 2006, Plaintiffs executed a second promissory note and deed of trust on the same property. (Id.) In March 2009, Plaintiffs spoke, by telephone, to an agent of Defendants "who refused to give them their full name and were advised that Plaintiffs would be eligible for a loan modification by reason of the financial hardships undertaken by

1 Plaintiffs as a result of Plaintiff's illness." (Id. ¶ XV.)
2 "Plaintiffs were advised not to make any more payments on their loan
3 in order to qualify for the loan modification program." (Id. ¶ XV
4 (#1-2).) In March 2009, Plaintiffs spoke, by telephone, to
5 Defendants "for purposes of electing to convert said loan to a fixed
6 rate loan." (Id. ¶ XIII.) Plaintiffs were advised "that said
7 right was no longer available to Plaintiffs and refused to permit
8 such a conversion as World Savings Bank was no longer in business."
9 (Id.) In April 2010, Plaintiffs were told they were approved for a
10 loan modification. (Id. ¶ XVII) On July 14, 2009, Defendants filed
11 a notice of default and election to sell on one of Plaintiffs' deeds
12 of trust. (Id. ¶ V.)

13 On May 25, 2010, Plaintiffs filed this lawsuit in state court.
14 On July 20, 2010, Defendants removed the lawsuit (#1) to federal
15 court, invoking our diversity jurisdiction. On July 27, 2010,
16 Defendants filed the pending motion to dismiss (#4) and request for
17 judicial notice (#5). Plaintiffs opposed (#10) the motion to
18 dismiss (#10), and Defendants replied (#13).

19

20 **II. Motion to Dismiss Standard**

21 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be
22 granted if the complaint fails to "state a claim to relief that is
23 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,
24 570 (2007). On a motion to dismiss, "we presum[e] that general
25 allegations embrace those specific facts that are necessary to
26 support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555,
27 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889

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1 (1990)) (alteration in original). Moreover, "[a]ll allegations of
2 material fact in the complaint are taken as true and construed in
3 the light most favorable to the non-moving party." In re Stac
4 Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation
5 omitted).

6 Although courts generally assume the facts alleged are true,
7 courts do not "assume the truth of legal conclusions merely because
8 they are cast in the form of factual allegations." W. Mining
9 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
10 "[c]onclusory allegations and unwarranted inferences are
11 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
12 F.3d at 1403 (citation omitted).

13 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
14 normally limited to the complaint itself. See Lee v. City of L.A.,
15 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
16 materials outside the pleadings in making its ruling, it must treat
17 the motion to dismiss as one for summary judgment and give the non-
18 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);
19 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A
20 court may, however, consider certain materials – documents attached
21 to the complaint, documents incorporated by reference in the
22 complaint, or matters of judicial notice – without converting the
23 motion to dismiss into a motion for summary judgment." Ritchie, 342
24 F.3d at 908.

25 If documents are physically attached to the complaint, then a
26 court may consider them if their "authenticity is not contested" and
27 "the plaintiff's complaint necessarily relies on them." Lee, 250
28

1 F.3d at 688 (citation, internal quotations, and ellipsis omitted).
2 A court may also treat certain documents as incorporated by
3 reference into the plaintiff's complaint if the complaint "refers
4 extensively to the document or the document forms the basis of the
5 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
6 adjudicative facts or matters of public record meet the requirements
7 of Fed. R. Evid. 201, a court may judicially notice them in deciding
8 a motion to dismiss. Id. at 909; see Fed. R. Evid. 201(b) ("A
9 judicially noticed fact must be one not subject to reasonable
10 dispute in that it is either (1) generally known within the
11 territorial jurisdiction of the trial court or (2) capable of
12 accurate and ready determination by resort to sources whose accuracy
13 cannot reasonably be questioned.").

14 III. Discussion

15
16 Defendants challenge Plaintiffs seventh and eighth claims for
17 breach of the implied covenant of good faith and fair dealing and
18 breach of fiduciary duty, respectively.¹

19 A. Breach of the Implied Covenant of Good Faith and Fair 20 Dealing

21 Plaintiffs' seventh claim alleges a violation of the implied
22 covenant of good faith and fair dealing. In every contract, there
23 is an implied covenant of good faith and fair dealing: "When one

24
25 ¹ Plaintiffs do not actually label their claims with the names
26 of causes of action under which they seek relief. Nevertheless,
27 Defendants characterize Plaintiffs' seventh and eight claims as
28 'breach of the implied covenant of good faith and fair dealing' and
'breach of fiduciary duty' and Plaintiffs do not dispute Defendants'
characterization.

1 party performs a contract in a manner that is unfaithful to the
2 purpose of the contract and the justified expectations of the other
3 party are thus denied, damages may be awarded against the party who
4 does not act in good faith." Hilton Hotels Corp. v. Butch Lewis
5 Prods., Inc., 808 P.2d 919, 923 (Nev. 1991). A breach of the
6 covenant occurs "[w]here the terms of a contract are literally
7 complied with but one party to the contract deliberately contravenes
8 the intention and spirit of the contract" Id. at 922-23.
9 The following provides a quintessential example of a circumstance
10 giving rise to a claim for breach of the implied covenant of good
11 faith and fair dealing: A lessee enters into a percentage lease
12 wherein it agrees to pay a certain percentage of gross sales
13 receipts as rental and then deliberately alters its business in a
14 way that reduces expected sales by, for example, diverting business
15 to another store for the sole purpose of bringing down the rent.
16 Id. at 924 n.6.

17 The allegations in Plaintiffs' complaint do not support a claim
18 for breach of the implied covenant of good faith and fair dealing.
19 There are no allegations indicating Defendants performed the
20 contract in a manner inconsistent with the intention or spirit of
21 the contract. Id. The information allegedly provided to Plaintiffs
22 telephonically by Defendants may indeed form the basis of another
23 claim for relief, but it does not support a claim for breach of the
24 implied covenant of good faith and fair dealing. Plaintiffs'
25 seventh claim will therefore be dismissed.

1 B. Breach of Fiduciary Duty

2 Plaintiffs' eighth claim is breach of fiduciary duty. Under
3 Nevada law, a "fiduciary relation exists between two persons when
4 one of them is under a duty to act for or to give advice for the
5 benefit of another upon matters within the scope of the relation."
6 Stalk v. Mushkin, 199 P.3d 838, 843 (Nev. 2009) (internal quotation
7 marks and citation omitted).

8 We have not discovered, nor have the parties provided, any
9 Nevada precedent addressing the issue of whether or not a fiduciary
10 relationship arises from the relationship between a lender and a
11 debtor. In Yerington Ford, Inc. v. General Motors Acceptance Corp.,
12 359 F. Supp. 2d 1075, 1090 (D. Nev. 2004) (overruled on other
13 grounds), a federal district court in the District of Nevada, faced
14 with the same lack of Nevada precedent, conducted an exhaustive
15 survey of Nevada case law regarding fiduciary relationships and
16 analyzed case law in other jurisdictions. The Yerington court
17 ultimately concluded that the "Nevada Supreme Court would hold that
18 an arms-length lender-borrower relationship is not fiduciary in
19 nature, absent exceptional circumstances." Id. We agree. Because
20 Plaintiffs have not alleged facts that might constitute "exceptional
21 circumstances," their claim for breach of fiduciary duty must fail.
22 Id. Plaintiffs' eighth claim will therefore be dismissed.

23
24 **IV. Leave to Amend**

25 Under Rule 15(a) leave to amend is to be "freely given when
26 justice so requires." FED. R. CIV. P. 15(a). In general, amendment
27 should be allowed with "extreme liberality." Owens v. Kaiser Found.

1 Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting
2 Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th
3 Cir. 1990)). If factors such as undue delay, bad faith, dilatory
4 motive, undue prejudice or futility of amendment are present, leave
5 to amend may properly be denied in the district court's discretion.
6 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th
7 Cir. 2003) (discussing Foman v. Davis, 371 U.S. 178, 182 (1962)).

8 In light of the liberal spirit of Rule 15(a), Plaintiffs should
9 have an opportunity to amend their complaint to cure the
10 deficiencies noted herein. If Plaintiffs do not amend their
11 complaint, this lawsuit will proceed with respect to the claims not
12 challenged by the motion to dismiss. If Plaintiffs choose to amend
13 the complaint and the amended complaint is similarly deficient,
14 however, we may be forced to conclude that leave to further amend
15 would be futile.

16 17 **VI. Conclusion**

18 Plaintiffs' seventh claim for breach of the implied covenant of
19 good faith and fair dealing fails because Plaintiffs do not allege
20 facts indicating Defendants performed the contract in a manner
21 inconsistent with the intention or spirit of the contract.
22 Plaintiffs' eighth claim for breach of fiduciary duty fails because
23 Plaintiffs have not alleged facts that might constitute "exceptional
24 circumstances." Plaintiffs will be given leave to amend.

1 **IT IS, THEREFORE, HEREBY ORDERED THAT** Defendants' Motion to
2 Dismiss (#4) is **GRANTED**. Plaintiffs' seventh and eighth claims are
3 dismissed.

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5 **IT IS FURTHER ORDERED THAT** Plaintiffs shall have twenty-one
6 (21) days within which time to file an amended complaint.

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9 DATED: December 6, 2010.


UNITED STATES DISTRICT JUDGE